LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 9 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 331

ISAAC A. TAFT,

Petitioner,

—versus—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SAMUEL S. MITCHELL
ROMALLUS O. MURPHY
126½ East Hargett Street
Raleigh, North Carolina
(MITCHELL AND MURPHY, *Of Counsel*)
Attorneys for Petitioner

INDEX

PAGE

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Statements of Facts 4

How the Federal Questions Are Presented 6

Reasons for Granting the Writ 7

CONCLUSION 16

APPENDICES:

A. Opinion of Court of Appeals 1a

B. Complaint 3a

C. Indictment 5a

D. Judgment and Commitment 7a

E. Verdict of the Jury 9a

F. Request to Appeal 10a

G. Notice of Appeal 11a

H. Appearance Bond 13a

I. Testimony From Transcript 22a

PAGE

Table of Cases:

Atkins v. United States, 240 F. 2d 849 (C. A. 5th 1957) 15

Bowles v. Texas Liquor Control Board, 146 F. 2d 155 (C. A. 4th 1944) 8
Brooks v. United States, 240 F. 2d 905 (C. A. 5th 1957) 13
Burney v. United States, 339 F. 2d 91 (C. A. 5th 1963) 15

Chandler v. United States, 318 F. 2d 357 (C. A. 10th 1963) 15-16

Dicks v. United States, 253 F. 2d 758 (C. A. 5th 1958) 16

Elkins v. United States, 364 U. S. 206, 80 S. Ct. 1437, 4 L. ed. 2d 1669 (1960) 8

Gambino v. United States, 275 U. S. 310, 48 S. Ct. 137, 72 L. ed. 293 (1927) 8

Hall v. United States, 41 F. 2d 54 (C. C. A. 9th 1930) 8

Mallory v. United States, 354 U. S. 449, 77 S. Ct. 1336, 1 L. ed. 2d 1479 (1957) 14
McNabb v. United States, 318 U. S. 332, 77 S. Ct. 1356, 1 L. ed. 2d ( ) 14
Middleton v. United States, 249 F. 2d 719 (C. A. 4th 1957) 16

Palmquist v. United States, 283 F. 2d 758 (C. A. 5th 1960) 16
Patton v. United States, 281 U. S. 276, 50 S. Ct. 253, 74 L. ed. 854 (1930) 13

PAGE

Pointer v. Texas, 380 U. S. 400, 85 S. Ct. 1065, 13 L. ed. 923 (1965) 13

Staples v. United States, 320 F. 2d 817 (C. A. 5th 1963) 8

Tank Truck Rental, Inc. v. Commissioner of Internal Revenue, 356 U. S. 30, 785, Ct. 507, 2 L. ed. 2d 507 (1958) 8

Turner v. State of Louisiana, 379 U. S. 466, 85 S. Ct. 506, 13 L. ed. 2d 424 (1963) 13

United States v. Cardillo, 316 F. 2d 606 (C. A. 2d 1963) 13

United States v. Happs, 331 F. 2d 332 (C. A. 4th 1964) 8

United States v. Romano, 330 F. 2d 566 (C. A. 2d 1964) 5, 16

West v. United States, 259 F. 2d 357 (C. A. 10th 1963) 16

Constitutional Provisions Cited:

Fifth Amendment to the Federal Constitution 8, 12, 13

Sixth Amendment to the Federal Constitution 8, 12, 13

Federal Statutes Cited:

Title 26, United States Code, Section 7206(4) 1, 3

Title 26, United States Code, Section 5609 ....3, 4, 5, 7, 9, 12, 15

PAGE

Federal Rules Cited:

Rules 33, 37, 39 and 52(b), Rules of Criminal Procedure 3, 6

State Statutes Cited:

North Carolina General Statutes 18-6 ..... 4, 8, 11

North Carolina General Statutes 18-6.1 ..... 4, 8, 10

North Carolina General Statutes 18-13 ..... 4, 8

North Carolina General Statutes 18-48 ..... 4, 8, 10

IN THE

Supreme Court of the United States

October Term, 1966

No. .....

ISAAC A. TAFT,

Petitioner,

—versus—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Justices of the Supreme Court of the United States:

The petitioner herein prays that a writ of certiorari issue to review the final Judgment of the United States Court of Appeals for the Fourth Circuit which was entered on the 11th day of May, 1966, and which affirmed the Judgment of the United States District Court, Eastern District of North Carolina, Washington Division. The Judgment affirmed by the United States Court of Appeals was a prison term of three years upon a conviction in the District Court for alleged removal of non-tax paid whiskey in violation of Title 26, U. S. C., Section 7206(4).

Opinion Below

The Opinion of the United States Court of Appeals for the Fourth Circuit has not, as of this writing, been reported. ——F. 2d —— (C. A. 4th 1966). A copy of said Opinion is attached to this Petition as Appendix A.

Jurisdiction

The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 11, 1966. On June 10, 1966, the Court entered an Order, pursuant to Rule 22(2) of the Revised Rules of this Court, granting petitioner until the 9th day of July, 1966, within which time to file the instant Petition. The jurisdiction of this Court is invoked under Title 28 U. S. C. 1254 (2).

Questions Presented

Defendant noted his appeal to the Court of Appeals without the aid of his trial counsel. He initiated his appeal efforts by writing a letter to the District Judge while he was in custody. (Appendix F). Judgment was entered against defendant on the 2nd day of November, 1965, and he remained in custody until he filed an appeal in proper form (Appendix G), on the 12th day of November, 1965, and posted an appearance bond in the amount of Five Thousand Dollars (Appendix H). His letter to the District Judge indicated his desire to appeal and his need of legal counsel for the noting and handling of an appeal. In view of defendant's incarceration for ten days after verdict and the fact that he had no counsel during such

period of time, defendant's failure to file Motions under Rule 33 (18 U. S. C.; Rule 33), setting up the question on this appeal is understandable. However, the questions presented on his appeal to the Court of Appeals are questions which go to the heart of trial by jury and a defendant's right to defend himself and they are questions which the Court of Appeals observe *sua sponte* and pursuant to Rules 37, 39 and 52 (b) of the Rules of Criminal Procedure. These questions, as presented to the Court of Appeals, are as follows:

> "1. Did the deliberate destruction of the alleged whiskey by the federal agents, upon the arresting of defendant, violate defendant's right to a trial by jury and right of confrontation?"
>
> "2. Did the deliberate destruction of the alleged whiskey by the federal agents, upon the arresting of defendant, violate defendant's Fifth Amendment right and opportunity to prepare defense to the charge against him?"

These same questions are among the questions here presented, along with questions pertaining to the application and interpretation of 26 U. S. C. 5609 and so much of the statute as reads: "Any destruction under this subsection shall be in the presence of at least one credible witness." The questions pertaining to the statute, which is quoted from above, are as follows:

> 3. Will a prosecution lie under Title 26, United States Code, Section 7206 (4), for removal of non-tax-paid whiskey where all of the alleged whiskey is immediately destroyed upon defendant's arrest and

before indictment or arraignment and where there was no "credible witness" present, as contemplated by 26 U. S. C. 5609?

4. In view of North Carolina General Statutes, Chapter 18, Sections 6, 6.1, 13, and 48, which enjoin North Carolina State officers from destruction of alleged non-tax-paid whiskey prior to trial in state Courts and which restrain North Carolina State officers, under criminal sanction, from referring non-tax-paid whiskey cases to Courts other than State Courts, can a North Carolina A. B. C. officer be a "credible witness," within the meaning of 26 U. S. C. 5609, to a "federal" seizure, arrest and whiskey destruction in which he fully participates?

All of these questions are the questions here presented.

Statements of Facts

Federal agents Spight, Blettner and Pitt County ABC agent Taylor testified, substantially, as follows:

On the night of June 4, 1965, at about 10:00 p. m., they went to the vicinity of the home of one James Johnson, a co-defendant in the District Court, which home is located seven or eight miles west of Greenville in Pitt County, North Carolina. None of the agents had a search warrant. They stationed themselves at various points around the Johnson residence, with Pitt County ABC agent Taylor and federal agent Spight in a cornfield immediately to the rear of the Johnson residence. These two officers were about thirty-five steps from the rear of the dwelling in knee high corn. Federal agents Blettner and Ellis were

stationed on the east side of the house, about fifteen or twenty yards from the house behind a tobacco barn.

At about 11:00 p. m., the federal and state agents said that they saw a 1957 red and white Chevrolet come into the yard with its headlights off and which was driven to the back of the yard. The agents said that they saw an individual moving but could not determine who they were; that they could hear the sound of heavy objects bumping inside and cardboard boxes being opened; that they could smell the odor of whiskey inclosed in jars coming from the direction of the Johnson dwelling; that no jars were broken until the agents broke the jars after defendant's arrest; that it is possible to smell whiskey in a closed jar from a house at a distance of thirty-five paces. Pitt County ABC agent Taylor testified that defendant was arrested placing a case of whiskey in the front seat of the automobile and that he had brought it out of the house.

The agents stated that they seized 66 gallons of whiskey and none of the whiskey seized had revenue stamps thereon. The whiskey was in half gallon fruit jars—some three cases were still in the house, the rest in the car. They testified that they destroyed the whiskey immediately after seizure, at 11:45 p. m. (see Appendix I, this Brief).

No whiskey or container was presented to the District Court nor was any reason given by the agents as to why they did not preserve some or a part of what they said was whiskey and at least a container which they said did not have stamps upon it. [See *United States* v. *Romano*, 330 F. 2d 566 (C. A. Conn. 1964).] The Government did not offer any "credible witness" to the alleged destruction of whiskey and containers (26 U. S. C. 5609).

How the Federal Questions Are Presented

While defendant did not raise questions in the District Court pertaining to the destruction of whiskey and containers prior to arraignment and pertaining to the nonproduction of a "credible witness" at trial, defendant urged these questions in the United States Court of Appeals pursuant to Rules 33, 37, 39, and 52(b).

All of the "raiders" and persons present were federal agents with the exception of Pitt County ABC agent Taylor. State agent Taylor, as he is hereafter referred to, fully participated in the seizure, arrest, and destruction and stated his role as follows:

"Direct Examination by Mr. Bass:

Q. Will you state your name and occupation for the record, please sir? A. Walter Taylor, ABC officer, Pitt County.

Q. And how long have you been employed in this capacity, Mr. Taylor? A. Ten years.

Q. Where do you live? A. Greenville.

Q. Greenville is your home? A. Yes, sir" (Transcript, page 31).

* * * * *

(Witness Taylor, State Agent, on Direct Examination)

"I was on the right side, Investigator Spight was on the left side. And at that time, Isaac Taft, whom I have known for about ten years, came out of this lighted doorway to the back of the car around to my side of the car, with a case the size of half gallon fruit jars, and placed it in the front seat of the automobile.

At that time, I jumped from the front of the automobile and grabbed Isaac by his belt and put my light

in his face and told him he was under arrest" (Transcript, page 33).

• • • • •

(Witness Taylor, State Agent, on Direct Examination)

"Q. Did you examine the cases that were in the car? A. Yes, sir.

Q. Were they half gallon fruit jar cases? A. Yes, sir. Containing non-tax paid whiskey.

Q. Did you examine the contents of the cases? A. Yes, sir, I did.

Q. What was in them? A. Non-tax paid whiskey.

Q. You took it out and examined it? A. Yes, sir, and destroyed it.

Q. And helped destroy it? A. Yes, sir. There in the edge of the yard, yes, sir. There was three more cases in the room that—

Q. How did you destroy it, by breaking it? A. Yes, sir.

Q. All of the cases—I believe you testified, sir, eight cases which were in the car, were all of them filled with jars that had non-tax paid liquor in them? A. Yes, sir.

Q. Each and every jar was filled? A. Yes, sir.

Q. All right, sir.

Mr. Bass: No more questions.

Thank you, sir (Transcript, pages 35-36).

Reasons for Granting the Writ

The instant case presents several fundamental and reoccurring problems and issues in the administration of the Federal Criminal Code in general and in the application of Title 26, United States Code, Section 5609 in particular.

This case also presents a complexity of constitutional issues pertaining to Fifth and Sixth Amendment protection of defendants on trial in federal courts. And in view of the role of state agent Taylor in arresting defendant, in aiding in the destruction of the alleged whiskey, and in referring the prosecution against defendant to the United States District Court—all in violation of state law [see North Carolina General Statute, Chapter 18, Sections 6, 6.1, 13, and 48], this case presents a delicate issue touching state and federal relationship, insofar as it presents the question of whether a participating and cooperating state agent in a federal raid should be adjudged a "credible witness" in a federal prosecution, where the participating and cooperating state agent was in open and flagrant violation of state law. Compare the rule of exclusion applicable to evidence obtained by a state agent which, if obtained by a federal agent, would have been inadmissible in a federal prosecution. *Staples* v. *United States,* 320 F. 2d 817 (C. A. 5th 1963); *United States* v. *Happs,* 331 F. 2d 332 (C. A. 4th 1964); *Elkins* v. *United States,* 364 U. S. 206, 80 S. Ct. 1437, 4 L. ed. 1669 (1960); *Gambino* v. *United States,* 275 U. S. 310, 48 S. Ct. 137, 72 L. ed. 293 (1927); *Hall* v. *United States,* 41 F. 2d 54 (C. C. A. 9th 1930). See, also, case holding that "whenever possible, that a State must not be thwarted in its policy", *Tank Truck Rental, Inc.* v. *Commissioner of Internal Revenue,* 356 U. S. 30, 2 L. ed. 2d 562, 78 S. Ct. 507 (1958). *Bowles* v. *Texas Liquor Control Board,* 146 F. 2d 155 (C. A. 4th 1944). Because of these matters, among others, the instant case is well suited for this Court's discretionary jurisdiction on Writ of Certiorari as is indicated in succeeding paragraphs.

In regard to the summary destruction of illegal, alcoholic spirits, 26 U. S. C. 5609 provides:

> ". . . In the case of seizure elsewhere than on premises qualified under this chapter of any unregistered still, distilling or fermenting equipment or apparatus, or distilling or fermenting material, for any offense involving forfeiture of the same, where it shall be impracticable to remove the same to a place of safe storage from the place where seized, the seizing officer is authorized to destroy the same. In the case of seizure, other than on premises qualified under this chapter or in transit thereto or therefrom, of any distilled spirits on which the tax has not been paid or determined, for any offense involving forfeiture of the same, the seizing officer is authorized to destroy the distilled spirits forthwith. *Any destruction under this subsection shall be in the presence of at least one credible witness.* The seizing officer shall make such report of said seizure and destruction and take such samples as the Secretary or his delegate may require" (emphasis added).

The evidence in the instant case leaves no doubt but that the government's seizures and destruction in this case failed to comply with 26 U. S. C. 5609, in that, destruction was not in the presence of a "credible witness." See Appendix I, this Petition. The government agents, William R. Spight and P. H. Blettner in particular, testified that the whiskey was destroyed immediately after seizure and no witness testified as to the presence of a "credible witness" or to the taking of samples. Indeed, the evidence excludes the serious contention that the agents *may have*

complied with the statute in the respects mentioned unless a state ABC agent is a "credible witness" within the meaning of the statute.

Had the state agent Taylor complied with state statute in the arrest of defendant and in his destruction of the alleged whiskey, defendant would have been tried in the state court and the alleged whiskey would have been preserved pursuant to state statute, until after defendant's trial in state court. North Carolina General Statute 18-6.1 reads:

> "All members of the State Highway Patrol and other State and local law enforcing officers shall, whenever seizing any vehicle on account of the unlawful transportation of intoxicating beverages, or equipment or materials designed or intended for use in the manufacture of intoxicating liquor, or making arrests of persons on account of same, refer the cases to the State court having jurisdiction thereof, to be determined by such State court in accordance with the law of this State. Any such officer who shall, in violation of this section, refer such cases to courts of another jurisdiction, shall be guilty of misfeasance in office and subject to a fine of one hundred dollars ($100.00)."

North Carolina General Statute 18-48 reads as follows:

> "It shall be unlawful for any firm, person or corporation to have in his or its possession any alcoholic beverages as defined herein upon which the taxes imposed by the laws of Congress of the United States or by the laws of this State, have not been paid and any person convicted of the violation of this section

shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court and the alcoholic beverage shall be seized and forfeited, together with any vehicle, vessel, aeroplane or other equipment used in the transportation and to carry the said alcoholic beverages, and the procedure pointed out in section 18-6 are hereby declared to be in full force and effect in any of the counties of the State which shall operate under the provisions of this article, and the possession of such alcoholic beverages in a container which does not bear either a revenue stamp of the federal government or a stamp of any of the county boards of the State of North Carolina shall constitute prima facie evidence of the violation of this section. The willful manufacturing or causing to be manufactured or the willful possession of any counterfeit or unauthorized beverage control stamps shall be unlawful and punishable as a misdemeanor."

Finally, North Carolina General Statute 18-6 reads, in part, as follows:

"... Whenever intoxicating liquor, or equipment or materials designed or intended for use in the manufacture of intoxicating liquor, transported or possessed illegally, shall be seized by an officer, he shall take possession of the vehicle and team or automobile, boat, air or watercraft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested, under the provisions of this article, in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execu-

tion by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. All liquor seized under this section shall be held and shall, upon the acquittal of the person so charged, be returned to the established owner, and shall within ten days upon conviction or default of appearance of such person be destroyed; provided, that any tax-paid liquor so seized shall within ten days be turned over to the board of county commissioners, which shall within ninety days from the receipt thereof turn it over to hospitals for medicinal purposes or sell it to legalized alcoholic beverage control stores within the State of North Carolina, the proceeds of such sale being placed in the school fund of the county in which such seizure was made, or destroy it."

Thus, it is apparent that the state of North Carolina has fully contemplated and provided that an arrested defendant should have full and complete rights of unfettered trial by jury and all of the constitutional safe-guards before trial or conviction as are promised to a defendant in a federal prosecution by the Sixth and Fifth Amendments to the Federal Constitution.

If "credible witness" in 26 U. S. C. 5609 is applicable to state agent Taylor, then the statute presents the anomalous and incredible circumstance of a state agent being allowed to employ the federal courts to abridge the Sixth Amendment rights to a jury trial and confrontation and

the Fifth Amendment rights to prepare and make defense. After the destruction of all of the alleged whiskey, the Government case presented to the jury the solitary question of the credibility of the Government's witnesses and reduced the machinery of trial by jury to one of previous trial by government and cooperating state agents, with subsequent rubber stamping by court and jury. Compare *Turner* v. *State of Louisiana,* 379 U. S. 466, 85 S. Ct. 546, 13 L. ed. 2d 424 (1965); *Patton* v. *United States,* 281 U. S. 276, 50 S. Ct. 253, 74 L. ed. 854 (1930); *Brooks* v. *United States,* 240 F. 2d 905 (C. A. 5th 1957). This was an effective and patent abridgment of the jury trial which defendant had painstakingly sought. Moreover, the Sixth Amendment guarantees a defendant the right of confrontation which includes the right of cross examination. *United States* v. *Cardillo,* 316 F. 2d 606 (C. A. 2d 1963); *Pointer* v. *Texas,* 380 U. S. 400, 85 S. Ct. 1065, 13 L. ed. 923 (1965). It is respectfully submitted that this right is abridged where federal agents are permitted to testify of seizures without warrants and of destruction of non-tax paid whiskey before arraignment of a defendant. In such a case a government witness has insulated himself from cross examination as fully as if he had pleaded the Fifth Amendment on cross examination (*United States* v. *Cardillo, supra*), or as though his testimony at trial were represented by a transcript in his absence (*Pointer* v. *Texas, supra*). A defendant can never effectively cross-examine a witness where the witness has completely destroyed the alleged contraband before trial. Nor can a defendant, in such circumstance, adequately prepare a defense where the composition and labeling of a material substance is an issue. Moreover, the agent's testimony of his summary destruction of non-tax paid whiskey, which he does not

exhibit to the jury, is well calculated to even withdraw from the jury's serious consideration the question of the credibility of the government witness and to make the jury a rubber stamp of a "trial" conducted by agents upon the premises.

While it is apparent that Congress was advertent to the effect of summary destruction of alleged whiskey upon the prosecution of a defendant in the United States District Court, in that, Congress provided substitute objectivity through the instrument of a "credible witness", it is respectfully submitted that the question of who is a "credible witness", as contemplated by the statute, is of such moment as to justify this Court's attention. The implications involved in construction and interpretation of this statute, as they pertain to the constitutional rights of a defendant on trial, as they pertain to the delicate and often strained relationship between state and federal law, as they pertain to the enforcement of the Federal Internal Revenue Code, and as they pertain to the conduct of similar trials in the several District Courts, are of such magnitude as to merit decision in the instant case by this Court.

Again, the legislative necessity that federal officers and agents obey legislative and procedural mandates in applying the criminal law has often been underscored by this Court, *Mallory* v. *United States,* 354 U. S. 449, 1 L. ed. 2d 1479, 77 S. Ct. 1356 (1957); *McNabb* v. *United States,* 318 U. S. 332, 87 L. ed. 819, 63 S. Ct. 608 (1943). In the *McNabb* case, *supra,* which dealt with illegal detention of a person charged, this Court emphasized the reasons underlining the necessity for compliance by federal officers with procedural mandates as follows:

"The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The lawful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard —not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society."

The Opinion of the Court below takes no notice of these salutary principles. Indeed the Courts of Appeals appear never to have faced the problems involved as pertain to destruction under 26 U. S. C. 5609 in the presence of a "credible witness". But rather the Courts of Appeals have seen the problem as one involving the "best evidence" rule. See the following cases: *Atkins* v. *United States,* 240 F. 2d 849 (C. A. 5th 1957); *Burney* v. *United States,* 339 F. 2d 91 (C. A. 5th 1964); *Chandler* v. *United States,* 318 F. 2d

357 (C. A. 10th 1963); *Dicks* v. *United States,* 253 F. 2d 713 (C. A. 5th 1958); *Middleton* v. *United States,* 249 F. 2d 719 (C. A. 4th 1957); *Palmquist* v. *United States,* 283 F. 2d 758 (C. A. 5th 1960); *West* v. *United States,* 259 F. 2d 868 (C. A. 5th 1958). The tendency of the Courts of Appeals to view the issues in this case as one involving the "best evidence" rule is so entrenched as to require decision by this Court. See *United States* v. *Romano,* 330 F. 2d 566 (C. A. 2d 1964).

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SAMUEL S. MITCHELL
ROMALLUS O. MURPHY
126½ East Hargett Street
Raleigh, North Carolina
Attorneys for Petitioner

MITCHELL & MURPHY
126½ East Hargett Street
Raleigh, North Carolina
Of Counsel for Petitioner